Custom Software Development Agreement

❖ The first part of the Memorandum should be completed and distributed to the other party along with a copy of the Custom Software Development Agreement.

Date: **[Month, Day, Year]**

To: **[Name of other party]**

From: **[Your Name]**

Subject: **Custom Software Development Agreement**

Attached to this memorandum is a Custom Software Development Agreement, the purpose of which is to set forth the exact terms of our contract to develop custom software.

Please review it carefully.

If the terms of the Agreement are acceptable, please sign and return one copy to us.

NOTICE:

We wish we could provide an agreement that was tailored exactly to your business. While this is not always possible, we feel that we've come very close and that this document provides you with the head-start that you need to get your deal moving. Nevertheless, we must make this disclaimer:

- **Do Not Use This Agreement 'As-Is.'**
- **This Agreement Is Not Legal Advice.**
- **Read it Thoroughly and Make All Appropriate Changes to Fit Your Requirements.**
- **You Should Have this Agreement Reviewed and Approved by a Qualified Attorney at Law Before Using It.**
- **JIAN Accepts No Liability for the Effectiveness of This Document For Your Purposes.**

Free Access to Attorneys, Accountants & Consultants in Your Area

- We're building a network of business experts who are eager to help you when you need it. They can review your work, make suggestions, handle unique situations and introduce you to influential people. On our website you can search by expertise and location, then e-mail or jump straight to their website. Although they are professionals and charge for their services, most offer an initial consultation free of charge. They're in your area and you can contact them directly. Look in our website under Professional Advisors Network.

Ongoing Update Service Keeps You Current

- Things change, laws change, the world changes... new ideas come along all the time. When you register, you can access our website to get updates and changes... like new and improved spreadsheets and documents. They can be downloaded directly to your computer. Look in our website under Products & Updates.

Remember to bookmark our website:
www.JIAN.com

- The first and most gratifying thing to do is to use the Replace or Change function (usually under the Edit menu) and customize all items identified within the "[ ]" brackets with your information. To make sure your have filled in all the variables, use your word processors FIND function to locate and "[" which contain an uncompleted variable.

- Upon completion, delete all comments and any unnecessary blank lines that remain.

- You may format this document any way you like.

Custom Software Development Agreement

❖ This is a standard introductory paragraph that lists the parties to the Agreement and the date it is being entered into. You need to enter the date of the Agreement, the names of the parties, the specific type of organization and their addresses.

This Custom Software Development Agreement ("Agreement") is entered into as of

the the Effective Date **[Date]**

between **[Name of the Customer]**, ("Customer")
a [State of organization or residence] [Corporation / Partnership / Sole Proprietorship / Resident],
with its principal place of business at [Address]

and **[Name of the programmer / programming company],** ("Contractor")
a [State of organization or residence] [Corporation / Partnership / Sole Proprietorship / Resident]
with its principal place of business at [Address].

General

❖ For the first insert in the first paragraph, state the purpose of the computer program, exactly what will it do. For the second insert, enter the basic hardware and operating system of the Customer's computer(s).

Customer desires Contractor to create a computer program and user manual (the "Program") for the purpose of [Enter purpose] to operate on the Customer's [Enter hardware information].

The Contractor is willing to create the Program, subject to the terms set forth below.

In consideration for the mutual promises, covenants, and agreements made below, the parties, intending to be legally bound, agree as follows:

❖ Section 1 sets forth the approval procedure for the software development process. For the first insert, indicate the number of days after this Agreement is entered into that the parties will meet to discuss the Specifications; for the second insert, indicate the number of days following that meeting that the Contractor must submit the Specifications to the Customer.

1. Creation of Specifications

Within [xx] days after the above date, the Contractor will meet with the Customer to discuss the performance specifications, flow charts, and acceptance test standards for the Program. Within [xx] days after that meeting, the Contractor will provide the Customer with flow charts and performance specifications for the Program. After the Contractor incorporates the Customer's modifications, if any, the parties will approve, in writing, the

final flow charts, performance specifications, and acceptance test standards (the "Final Specifications).

- In the first set of brackets in Section 2, the Contractor will give the Customer a quotation. If the Customer does not approve of the quotation (within the amount of time entered into the first set of brackets), this Agreement terminates, and the Customer is required to pay the Contractor within a certain (indicate time in the third set of brackets) period after termination. The fourth set of brackets has the amount for the contractor's fee for creating the Final Specifications.

2. Establishment & Payment of Final Price

2.1 Within [xx] days after the parties agree to the Final Specifications, the Contractor agrees to provide the Customer with a written price quotation to create and install the Program and to perform the Training Services (defined below). Assuming the price is satisfactory, the Customer shall notify the Contractor in writing. If the price is not approved by the Customer within [xx] days after it is sent to the Customer, this Contract shall terminate, and the Customer shall pay to the Contractor, within [xx] days after that termination, the sum of $[xxx] Dollars for services in creating the Final Specifications.

2.2 If the Program is completed and installed, the Customer shall pay to the Contractor the fees established above within ten (10) days after the Certificate of Acceptance (as described in Section 3) is, or should have been, delivered by the Customer to the Contractor.

- The Contractor will complete the Program within the bracketed period following Final Specification approval. After an acceptance test is successfully conducted jointly by the parties, the Customer will execute a Certificate of Acceptance, that it will send to the Contractor. The Contractor will then complete and deliver any manuals to the Customer within the final bracketed period.

3. Creation of the Program

Within [xx] days after agreeing to the Final Specifications, the Contractor will create, test, and then deliver to the Customer the software portion of the Program, that the Customer will install onto its computer. A representative of the Contractor and the Customer will then jointly perform an acceptance test. If the Program does not meet the Final Specifications, the Contractor shall promptly correct and re-submit the Program for acceptance testing. When the Program performs in accordance with the Final Specifications, the Customer shall deliver to the Contractor a Certificate of Acceptance (see Exhibit A). Once the Certificate of Acceptance is delivered, the Contractor shall prepare the applicable user manuals and deliver them within [xx] days after the date of the Certificate of Acceptance.

4. Modifications

If the Customer desires to modify the Final Specifications, it shall notify the Contractor, and the Contractor shall quote a price and revised timetable that will be incorporated into a Change Order signed by both parties.

❖ Assuming that training is included, complete the following section. The first insert describes the number of employees who will be trained, and the second insert establishes the training period.

5. Training

Upon delivery of the Program to the Customer, the Contractor shall provide the Customer with training of up to [x] (Enter number) days, of the Customer's employees in the use of the Program. This training shall be for a period of up to [x] (Enter number) hours. The Training is provided at no charge, except that the Customer will reimburse the Contractor for the reasonable out-of-pocket expenses incurred by employees of the Contractor (transportation, room, and board in connection with the training).

6. Updates & Enhancements

Although the Contractor is not obligated to update or enhance the Program, if it does it will promptly notify the Customer who will have the right to acquire the updated material at the Contractor's regular and established prices.

❖ Following, are two versions of Section 7, "Ownership of the Program." Select the one that best fits your needs.

❖ If the Contractor will own the Program and license it to the Customer for its internal use only, then select the first Section 7. However, if the Customer will own the Program and the Contractor will maintain no interest, use the second Section 7 and delete Sections 8, 9, 10, 11 and 14.2.

7. Ownership of the Program

The entire right, title, and interest in the Program and all materials relating to the Program belong to the [Contractor], subject to the license grant set forth in Section 10 of this Contract.

[Or]

7. Ownership of the Program

The entire right, title, and interest in the Program and all materials relating to the Program belong to the Customer.

8. License Grant

The Contractor grants to the Customer a non transferable, non-exclusive right and license to use the Program for the Customer's internal purposes only, subject to the terms of this Contract (the "License").

9. Multiple Copies

For its internal purposes only, the Customer may make copies of and use the Program on as many computers and terminals as it owns or leases.

❖ Except for a merger or sale of the Customer's business, it must receive the Contractor's approval in order to sell or otherwise transfer any copies of the Program.

10. Transfer of Customer's License

The Customer does not have the right to sell or otherwise transfer its copies of the Program or the license granted in Section 8 without the express written consent of the Contractor, except in connection with its merger or the sale of all or substantially all of its assets. In the event of such a merger or sale, the permitted successor must notify the Contractor of its succession to the Customer's rights and agree in writing to be bound by the terms of this Agreement.

11. Labels

Each copy of the Program must be conspicuously labeled or otherwise marked in such a manner that indicates that the material is the property of the Contractor and may not be used or copied except as permitted by this Agreement.

- If the Program proves to be defective within the period of time (inserted in the brackets) following execution of the Certificate of Acceptance, the Contractor will remedy the problem. However, the Customer modifications will void this warranty.

12. Defects

In the event of any defect in the Program within [Enter number] year(s) after the date of the Certificate of Acceptance, the Customer shall notify the Contractor in writing. At no charge, the Contractor shall then take prompt action to remedy and correct any failure of the Program to meet the Final Specifications. However, if the Customer makes modifications to the Program, the remedy set forth in this Section 12 shall not apply.

- This is a standard warranty disclaimer.

13. Waiver of Warranty

The contractor makes no warranty of any kind, express or implied, including, without limitation, warranties of merchantability and fitness for a particular purpose. The contractor shall not be liable for any damages, whether direct, indirect, special, or consequential. The customer agrees that the programs are not consumer goods for purposes of federal or state warranty laws.

14. Termination

14.1 Upon payment of the amount stated in Section 2 and pursuant to that section, the Customer may terminate this Agreement.

- If the Customer breaches and does not cure its breach within the period of time (inserted in brackets) following notice by the Contractor, the License terminates and the Customer must either erase or return all copies of the Program and any manuals to the Contractor.

14.2 If the Customer breaches this Agreement and the breach is not cured within [x] (Enter number) days after the Contractor notifies the Customer, the License shall terminate immediately. The Customer shall then erase and / or return to the Contractor all disks or other storage medium bearing the Program and all user manuals.

❖ This section, often titled "Miscellaneous," lists a number of standard clauses found in most agreements.

15. General Provisions

❖ Section 15.1 requires all changes to this Agreement, including any waivers, be in writing and signed by the party against whom compliance is sought. Also, if one party waives a promise or condition such as a deadline, that doesn't mean that the promise or condition is automatically waived again.

15.1 Waiver, Amendment, Modification. No waiver, amendment or modification, including those by custom, usage of trade, or course of dealing, of any provision of this Agreement will be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No waiver by any party of any default in performance by the other party under this Agreement or of any breach or series of breaches by the other party of any of the terms or conditions of this Agreement shall constitute a waiver of any subsequent default in performance under this Agreement or any subsequent breach of any terms or conditions of that Agreement. Performance of any obligation required of a party under this agreement may be waived only by a written waiver signed by a duly authorized officer of the other party, that waiver shall be effective only with respect to the specific obligation described in that waiver.

❖ [ ]Unforeseeable, supervening events beyond either parties' control, that render the contract impossible to perform and that could not have been prevented by diligence and care of the parties excuse them from performing under the contract. Note that you can draft a Force Majeure clause to account for particular events that we have not included such as labor shortages or riots.

15.2 Force Majeure. Neither party will be deemed in default of this Agreement to the extent that performance of its obligations, or attempts to cure any breach, are delayed or prevented by reason of circumstance beyond its reasonable control, including without limitation fire, natural disaster, earthquake, accident or other acts of God ("Force Majeure"), provided that the party seeking to delay its performance gives the other written notice of any such Force Majeure within 15 days after the discovery of the Force Majeure, and further provided that such party uses its good faith efforts to cure the Force Majeure. If there is a Force Majeure, the time for performance or cure will be extended for a period equal to the duration of the Force Majeure. This Article shall not be applicable to any payment obligations of either party.

❖ Most of Agreement*Builder's* agreements include a section on the Settlement of Disputes. Rather than having to endure the time and expense of a civil trial, mediation and, if necessary, arbitration, these are fast, effective, and relatively inexpensive alternative dispute resolution vehicles.

15.3 Settlement of Disputes

❖ In those situations where legal remedies, that is, money damages, may not be sufficient, we have provided for injunctive relief, where the breaching party would be required to do or refrain from doing something.

15.3.1 Injunctive Relief

15.3.2 The Customer agrees that, if any unauthorized Program copy is made or if the Program is used in violation of this Contract, the Contractor shall have the right to obtain an injunction against that unauthorized copying or use, in addition to any other rights and remedies to which the Contractor may be entitled.

15.3.3 Each party acknowledges and agrees that, if there is any breach of this Agreement, including, without limitation, unauthorized use or disclosure of Confidential Information or other information of the other party, the non-breaching party will suffer irreparable injury that cannot be compensated by money damages and therefore will not have an adequate remedy at law. Accordingly, if either party institutes an action or proceeding to enforce the provisions of this Agreement, such party will be entitled to obtain such injunctive relief, specific performance, or other equitable remedy from a court of competent jurisdiction as may be necessary or appropriate to prevent or curtail any such breach, threatened or actual. These will be in addition to and without prejudice to such other rights as such party may have in law or in equity.

- The following paragraph sets forth the specific rules for mediation. We have given you 30 days to agree on a mediator and 45 days to resolve the matter altogether. After that, the matter goes to arbitration subject to Section 15.3.4

- Where indicated, you also need to fill in the city and state where the mediation will take place.

15.3.4 Any dispute, controversy, or claim arising out of or related to this Agreement, or the creation, validity, interpretation, breach, or termination of this Agreement will be referred to mediation before, and as a condition precedent to, the initiation of any adjudicative action or proceeding, including arbitration. The mediation will be held in [City and State]. Either party may demand mediation in writing, serving on the other party a statement of the dispute, controversy, or claim, and the facts relating to it, in reasonable detail. Furthermore, if within thirty (30) days after such demand, the parties have not agreed upon a mediator and commenced mediation, the matter will be referred to arbitration under Section 15.3.5. Furthermore, if, within forty-five (45) days after such demand the matter has not been resolved to the satisfaction of both parties, then the matter will be referred to arbitration under Section 15.3.5

- The following section sets forth the specific rules for arbitration. Once one of the parties requests an arbitration and appoints the first arbitrator, the other party has 30 days to name the second arbitrator. Within 10 days of that, the two arbitrators then name a third arbitrator.

15.3.5 Any dispute, controversy, or claim arising out of or related to this Agreement, or the creation, validity, interpretation, breach, or termination of this Agreement that has not been resolved amicably among the parties by mediation, will be submitted to binding arbitration using the following procedure:

❖ Indicate the city and state where the arbitration will take place.

15.3.6 The arbitration will be held in [City and State], before a panel of three arbitrators. Either party may demand arbitration in writing, serving on the other party a statement of the dispute, controversy, or claim, and the facts relating to it, in reasonable detail, and the arbitrator nominated by that party.

15.3.7 Within thirty (30) days after such demand, the other party will name its arbitrator, and the two arbitrators named by the parties will, within ten (10) days, select a third arbitrator.

15.3.8 The arbitration will be governed by the Commercial Arbitration Rules of the American Arbitration Association (the "AAA"), except as expressly provided in this Article. However, the arbitration will be administered by any organization mutually agreed upon by the parties. If the parties are unable to agree upon the organization to administer the arbitration, it will be administered by the AAA. The arbitrators may not amend or disregard any provision of this section.

15.3.9 The expenses of arbitration shall be borne by the party against whom the decision is rendered, or apportioned in accordance with the decision of the arbitrators if there is a compromise decision. Judgment upon any award may be entered in any court of competent jurisdiction. All notices from one party to the other relating to any arbitration under this agreement shall be in writing and shall be effective if given in accordance with Section 15.13 below.

❖ This is a standard non-disclosure provision so that both parties agree that any confidential information disclosed to the other is the property of the disclosing party and such information, in addition to the terms of this Agreement, may not be disclosed to third parties. The exception to this is when the disclosing party can prove that it already had the information, or the information becomes available to the general public. This non-disclosure requirement continues to be effective even upon or after termination of this Agreement.

15.4 Proprietary Information. Each party acknowledges that it may be furnished with or may otherwise receive or have access to information or material which relates to past, present or future products, software, research development, inventions, processes, techniques, designs or technical information and data, marketing plans, and so on, (The "Proprietary Information"). Each party agrees to preserve and protect the confidentiality of the Proprietary Information and all of its physical forms, whether disclosed to the other party before this Agreement is signed or afterward. In addition, a party shall not disclose or disseminate the Proprietary Information for its own benefit or for the benefit of any third party. The previously stated obligations do not apply to any information which
(1) is publicly known;
(2) is given to a party by someone else who is not obligated to maintain confidentiality; or
(3) a party had already developed prior to the day this Agreement is signed, as evidenced by documents.

Neither party shall take or cause to be taken any physical forms of Proprietary Information (nor make copies of same) without the other party's written permission. Within three (3) days after the termination of this Agreement (or any other time at the other party's request), a party shall return to the other party all copies of Proprietary Information in tangible form. Despite any other provisions of this Agreement, the requirements of this Section shall survive termination of this Agreement.

- Independent contractors are not employees in that they offer their services to the general public, not only one company, and they have some control over the outcome and means of performing a project. Legally, an independent contractor cannot bind its client. Furthermore, an independent contractor is responsible for its own withholding, unemployment taxes, and insurance. While the following section makes all of this clear, make sure you carefully review Agreement*Builder's* discussion on "Managing Employees and Contractors" and make sure your independent contractors are independent, not employees. Improper classification can result in stiff I.R.S. penalties.

15.5 Independent Contractor. Nothing in this Agreement will be deemed to place the parties in the relationship of employer / employee, partners, or joint venturers. Neither party shall have any right to obligate or bind the other in any manner. Each party agrees and acknowledges that it shall not hold itself out as an authorized agent with the power to bind the other party in any manner. Each party will be responsible for any withholding taxes, payroll taxes, disability insurance payments, unemployment taxes, and other similar taxes or charges with respect to its activities in relation to performance of its obligations under this agreement.

- The next section describes how no one right or remedy excludes other rights or remedies.

15.6 Cumulative Rights. Any specific right or remedy provided in this Agreement shall not be exclusive but shall be cumulative upon all other rights and remedies set forth in this section and allowed under applicable law.

- In this next section, you must decide which state laws govern this Agreement. Generally, it is your (company's) state of residence. Insert that state in all three inserts.

15.7 Governing Law. This Agreement shall be governed by the laws of the State of [State] applicable to agreements made and fully performed in [State] by [State] residents.

- The following paragraph states that this Agreement is intended to be the only agreement between these parties regarding this particular matter, and that no other documents or communications, whether oral or written, are binding. Therefore, it is very important to make sure that everything the parties have agreed to and want to include is accounted for in the body of this Agreement.

15.8 Entire Agreement. The parties acknowledge that this Agreement expresses their entire understanding and Agreement, and that there have been no warranties, representations, covenants or understandings made by either party to the other except such as are expressly set forth in this section. The parties further acknowledge that this Agreement supersedes, terminates and otherwise renders null and void any and all prior

Agreements or contracts, whether written or oral, entered into between Contractor and Customer with respect to the matters expressly set forth in this Agreement.

- Generally, more than one copy of an agreement is executed. This means that all copies are the same.

15.9 Counterparts. This Agreement may be executed in multiple counterparts, any one of which will be deemed an original, but all of which shall constitute one and the same instrument.

- If there is a lawsuit or proceeding involving this Agreement, the losing party agrees to pay the winning party his or her costs and expenses, including reasonable attorney fees.

15.10 Attorney Fees. If either party is required to retain the services of any attorney to enforce or otherwise litigate or defend any matter or claim arising out of or in connection with this Agreement, then the prevailing party shall be entitled to recover from the other party, in addition to any other relief awarded or granted, its reasonable costs and expenses (including attorneys' fees) incurred in the proceeding.

- This section is self-explanatory.

15.11 Compliance with Law. Both parties agree to comply with all applicable federal, state, and local laws and regulations in performing their duties.

- If any part of this Agreement is unenforceable or invalid, the balance of the Agreement should be enforced. Basically, ignore any sections that are invalid.

15.12 Severability. If any provision of this Agreement is found invalid or unenforceable under judicial decree or decision, the remainder shall remain valid and enforceable according to its terms. Without limiting the previous, it is expressly understood and agreed that each and every provision of this Agreement that provides for a limitation of liability, disclaimer of warranties, or exclusion of damages is intended by the parties to be severable and independent of any other provision and to be enforced as such. Further, it is expressly understood and agreed that if any remedy under this agreement is determined to have failed of its essential purpose, all other limitations of liability and exclusion of damages set forth in this section shall remain in full force and effect.

- All notices between the parties must be in writing and delivered or mailed certified, return receipt requested.

15.13 Notices. All notices, demands or consents required or permitted under this agreement shall be in writing and shall be delivered or mailed certified return receipt requested to the respective parties at the addresses set forth above or at such other address as such party shall specify to the other party in writing. Any notice required or permitted to be given by the provisions of this Agreement shall be conclusively deemed to have been received on the day it is delivered to that party by U.S. Mail with Acknowledgment

of Receipt or by any commercial courier providing equivalent acknowledgment of receipt.

❖ The following is merely a formality.

Captions and section headings used in this Agreement are for convenience only and are not a part of this Agreement and shall not be used in construing it.

Understood, Agreed & Approved

We have carefully reviewed this contract and agree to and accept all of its terms and conditions. We are executing this Agreement as of the Effective Date above.

Customer	**Contractor**
_____	_____
By	By
_____	_____
Name	Name
_____	_____
Title	Title

Exhibit A

Certificate of Acceptance

The undersigned Customer acknowledges that the Program has been found to perform in accordance with the Final Specifications of the Contract and accepts the Program.

[Month, Day, Year]

_____

Name

_____

Title